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CITATIONS

778036—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 559

REPUBLIC AVIATION CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

SAMUEL S. LOWE, DEPUTY COMMISSIONER OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, SECOND COMPENSATION DISTRICT, AND AIDA M. PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 86–103) is reported at 69 F. Supp. 472. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 113–118) is reported at 164 F. 2d 18.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered November 6,

1947 (R. 118–119). The petition for a writ of certiorari was filed January 30, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the air base being used by the armed forces of the United States on Ia Shima is an air base "acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1) of the Defense Base Act, as amended.

2. Whether the court below erred in sustaining the award under the Defense Base Act on the theory that Ia Shima was "acquired" within the meaning of Section 1 (a) (1) of that Act as amended, where the award was made by the deputy commissioner and was sustained by the District Court on the theory that claimant's decedent was employed under a contract for "public work" within the meaning of Section 1 (a) (4) of that Act as amended.

3. Whether a service contract under which the Republic Aviation Corporation agreed to furnish to the United States the services of aircraft technicians is a contract for "public work" within the meaning of Sections 1 (a) (4) and 1 (b) of the Defense Base Act, as amended.

STATUTE INVOLVED

The pertinent portions of Section 1 of the Defense Base Act of August 16, 1941, c. 357, 55 Stat.

622, as amended by Title III of the Act of December 2, 1942, c. 668, 56 Stat. 1035 (42 U. S. C., Supp. V, 1651), are as follows:

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

* * * * *

(4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of

compensation and other benefits under the provisions of this Act, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

(b) As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

* * * * *

STATEMENT

Petitioners seek to review the judgment of the court below sustaining a compensation award to

respondent, Aida M. Parker. The controversy arose out of the following facts:

By a fixed price service contract with the United States dated October 29, 1943, and various supplements thereto, petitioner Republic Aviation Corporation agreed to furnish the services of aircraft technicians and test pilots to the Army Air Forces whenever requested (R. 25–27; Carrier's Exhibits 1–4, R. 37–85). Pursuant to this contract, Joseph F. B. Parker, who was employed by Republic as a test pilot and technician, was sent by Republic to the Pacific War Theatre at the request of Lieut. Gen. Kenney of the Far East Air Force (R. 24, 25, 27–28, 29). Parker's salary and expenses of transportation were charged to the service contract between the United States and Republic Aviation Corporation (R. 28). His mission was to assist in developing the range characteristics of the then new Republic P–47 aircraft (R. 29). While engaged in trying to solve this technical problem, Parker was killed on August 20, 1945, in a test flight take-off from the air field on Ia Shima (R. 28, 31).

Ia Shima, an island in the East China Sea, near Okinawa, was formerly a possession of Japan, but was invaded about April 1, 1945, by the armed forces of the United States, which took possession of the air base on the island by force of arms and were in possession of it at the time Parker met his death (R. 15, 18).

Respondent Aida M. Parker, widow of Joseph

F. B. Parker, filed a claim for compensation under the Defense Base Act, c. 357, 55 Stat. 622, as amended (42 U. S. C., Supp. V., 1651–1654), which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, to cover employees in certain defense work outside the United States (R. 15). Petitioners controverted the claim on the ground that Parker was not engaged at the time of his death in any employment covered by the Defense Base Act as amended (R. 17–19). After a hearing, respondent Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, entered an award in favor of Mrs. Parker, holding that the decedent's employment was within the scope of that Act, and particularly within the scope of Section 1 (a) (4) relating to employment under a contract for "public work" as that term is defined in Section 1 (b) of the Act (R. 8–9, 21, 35–36).

This proceeding was brought by petitioners in the United States District Court for the Southern District of New York under Section 21 of the Longshoremen's Act and Section 3 (b) of the Defense Base Act to set aside the compensation award (R. 3–7). The District Court sustained the award on the same ground taken by respondent Lowe, and rejected the contention made there on behalf of respondent Aida M. Parker that the decedent's employment was covered by Section 1 (a) (1) of the Defense Base Act, as amended, which

covers any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government (R. 99–103). On appeal, the court below held that the air base on Ia Shima was an air base "acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1), and affirmed the judgment of the District Court on that ground, so that it had no occasion to consider the ground of decision in that court, that the decedent's employment was on a contract for "public work" as contemplated by Section 1 (a) (4) (R. 113–118).

ARGUMENT

Petitioners contend that the decedent was not covered by the Defense Base Act, first, because Ia Shima was not "acquired" from a foreign government, second, that even if it was the award is not sustainable upon that ground because neither the Deputy Commissioner nor the District Court relied thereon, and, third, that the work upon which decedent was engaged at the time of his death (the ground relied upon by the Deputy Commissioner and the district court) was not "public work" within the meaning of the Act. We submit that the decision below was correct and, alternatively, that the ground relied upon by the Deputy Commissioner and the District Court is adequate to sustain the award.

1. Petitioners contend that as ordinarily used

the term "acquired" carries with it the idea of permanent possession, that the possession of Ia Shima by the United States was and is merely temporary, and that therefore the court below erred in holding that Ia Shima had been "acquired" by the United States (Pet. 12–13). Petitioners' own citations demonstrate that there is no basis for the contention that in ordinary usage the term "acquired" connotes only permanent possession as distinguished from temporary possession. According to the Century Dictionary, as quoted by petitioners, "* * * a mere temporary possession is not expressed by *acquire* but by *obtain*, procure, etc.," while the New Standard Dictionary definition of "acquire" which they quote is "*to obtain* by search, endeavor, practise or purchase * * *" (Italics supplied; Pet. 12–13). Thus, while the word "obtain" is distinguished from "acquire" by one authority, it is used by another authority to define "acquire." Moreover, Webster's New International Dictionary (2d ed.) defines "acquire" as "to gain by any means, usually by one's own exertions; to get as one's own; * * *," while "obtain" is defined by the same authority as "to get hold of by effort; to gain possession of; to procure; *to acquire,* in any way; * * *" [Italics supplied]. So, while it may be true, strictly speaking, that a mere temporary possession is not expressed by "acquire" but by "obtain," the fact that reliable authorities use each of these terms in defining the other shows clearly that in

ordinary usage no distinction is made between them. In fact, they have been held to be legal equivalents. *United States* v. *Winnicki,* 151 F. 2d 56, 59 (C. C. A. 7). As this Court said in *Helvering* v. *San Joaquin Co.,* 297 U. S. 496, 499, "* * * The word 'acquired' is not a term of art in the law of property but one in common use * * *."

Petitioners cite *Helvering* v. *San Joaquin Co., supra,* in support of their argument that a thing is not "acquired" when the intention is merely to use it temporarily and to dispose of it when the immediate need is terminated (Pet. 13). This Court held in that case that where land held under a lease with an option to purchase was ultimately purchased by the lessee, the land was "acquired" within the meaning of the revenue laws at the time of the purchase and not at the time of the leasing. But to hold that a leasing was not an acquisition under Section 1 (a) (1) of the Defense Base Act as amended would be to hold that Section inapplicable to the bases leased to the United States by Great Britain in exchange for fifty destroyers in September, 1940. Yet the legislative history of the Defense Base Act shows clearly that it was intended to cover employees of contractors at the bases leased from Great Britain, and petitioners concede that this is true (Pet. 14). See H. Rept. 1070, 77th Cong., 1st sess., p. 5. Petitioners seek to reconcile their contention with this fact by arguing that it is the

intention of the United States Government to use these British bases "* * * permanently * * * on a continuous long term basis," so that regardless of the fact that there has been no transfer of sovereignty over these bases, there is, nevertheless, a definite difference between the circumstances with regard to these bases and the circumstances with regard to such bases as Ia Shima (Pet. 14). But since these bases are merely leased and there has been no transfer of sovereignty over them, petitioner is simply arguing that our possession of those bases is permanent because it is less temporary than our possession of other bases, an argument which is obviously untenable.[1]

Petitioners argue also that "To say that the United States 'acquired' Ia Shima logically requires a holding that the United States also acquired parts of North Africa, Italy, France, Germany, Holland, Belgium, China and many other parts of the world" (Pet. 13). The statute refers to "* * * any military, air, or naval base acquired * * *," and we submit that any

[1] Moreover, this argument is based on the broad assumption that the United States will retain possession of the British bases longer than it will retain possession of bases in occupied enemy territory. There is no way now of knowing whether this will be the case. Japan and her outlying possessions are still under military occupation, and the air base on Ia Shima has not been abandoned but is being used by the Army Air Force as an alternate or auxiliary field. The disposition to be made of Ia Shima will not be finally determined until a peace treaty is signed.

civilian employee engaged in any employment at any such base in any of the countries named would be covered by the provisions of the Defense Base Act as amended. Petitioners do not suggest any reason why employees at a base of which the United States gained possession by force of arms should be denied the protection afforded by the Act to employees at a base which was acquired by friendly negotiations. Whatever force there might be to petitioners' argument that Section 1 (a) (1) of the Defense Base Act as originally enacted in August 1941 referred only to bases leased from Great Britain, disappeared with the reenactment of that subsection in December 1942, after this country had been at war for one year. Prior to Pearl Harbor, we could have acquired bases from foreign governments only by lease or some other formal transfer. However, it must be assumed that upon the reenactment of the subsection in December 1942, Congress must have intended it to apply to all bases on foreign soil no matter how acquired.

The legislative history of the Act of December 2, 1942, c. 668, 56 Stat. 1028, which amended the Defense Base Act, discloses a clear intent on the part of Congress to provide the broadest possible coverage to civilian employees of contractors working outside the United States.[2] This is forti-

[2] Excerpts from the legislative history of the 1942 Act which indicate the intended scope of the Act are set out in the Appendix, *infra*, pp. 19–23.

fied by Section 20 (a) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. 920 (a)) made applicable by Section 1 (a) of the Defense Base Act, which provides that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the Act.

In the administration of this Act both the War Department and the Navy Department required contractors with the Government to provide insurance coverage for their employees on every contract where the work was to be performed outside the United States and such work was in the prosecution of the war (R. 32–35). This administrative interpretation of the statute is entitled to great weight. *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 182; *Boutell* v. *Walling*, 327 U. S. 463, 471. We submit that the air base at which the decedent was killed was clearly an air base "* * * acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, and that the decision of the court below sustaining the compensation award on that theory is entirely correct.

2. Petitioners now argue that the only question litigated at the trial was whether the contract between the Government and Republic Aviation Corporation was a "public work" contract under Section 1 (a) (4) of the Defense Base Act and that no evidence was introduced on the issue of

whether Ia Shima was "acquired" within the meaning of Section 1 (a) (1) of the Act, and that accordingly it was error for the court below to sustain the award on the latter theory (Pet. 6, 14). Aside from the fact that the presumption created by Section 20 (a) of the Longshoremen's and Harbor Workers' Compensation Act made such evidence unnecessary, the record shows that the hearing before respondent Samuel S. Lowe it was stipulated that under the terms of its contract with the Government, Republic Aviation Corporation was rendering service "* * * at Ia Shima, an island in the Pacific Ocean, formerly a possession of Japan, but prior to August 20, 1945, acquired by the United States by conquest," and there is a finding based on this stipulation (R. 9, 15). Furthermore, the record shows that at the hearing counsel for petitioners made a preliminary statement in which he discussed the applicability to the pending claim of each subparagraph of Section 1 (a), and in which he made the following statement (R. 18):

> * * * The Island of Ia Shima was held by the Japanese Government until it was invaded about April 1, 1945 by the armed forces of the United States. The armed forces of the United States took possession of the air base in question by force of arms and was [sic] in possession of the base on August 20, 1945 at the time the employee met his death.
>
> Sub-paragraph (1) of Section 1651 applied in respect to the injury or death of

> any employee engaged in any employment at any military, air or naval base acquired after January 1, 1940 by the United States from any foreign government. We contend that inasmuch as the armed forces of the United States took possession of the air base where the accident occurred on the Island of Ia Shima by force of arms, this air base was not "acquired by the United States from a foreign government" as that term is used in sub-paragraph (1).

We submit that this stipulation and this statement by petitioners' counsel eliminated all factual issues from this phase of the case. The only issue raised at that time was one of law, as to whether an air base of which the United States had taken possession by force of arms had been "acquired" within the meaning of the Act. Having failed to question then the sufficiency of the agreed facts to form a basis for determining this issue of law, petitioners should be precluded from raising a factual issue here. *United States* v. *New York Telephone Co.*, 326 U. S. 638, 651 fn.

3. If this Court should hold that the Ia Shima air base was not "acquired" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, then respondent contends that the compensation award involved herein should be sustained on the ground that the decedent was employed under a contract for "public work" as defined in Section 1 (b), and was therefore covered by the provisions of Section 1 (a) (4) of

the Act. The award was made by respondent Lowe on the theory that the latter section was applicable, and was sustained by the District Court on the same theory (R. 21, 103). This ground for decision was not considered by the court below, as it sustained the award on the theory that Section 1 (a) (1) was applicable (R. 118).

Section 1 (b) of the Defense Base Act as amended (42 U. S. C., Supp. V, 1651 (b)) provides:

> As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

The United States Employees' Compensation Commission has construed this statutory definition as embracing three general work categories, taking the view that the second and third clauses of the above definition are coordinate clauses, each independent of the principal clause in meaning (R. 21–22). Thus, the general category held to be established by the second clause is (R. 22):

* * * * *

> (2) employments related (a) to any projects in connection with the war effort, and (b) any projects which fall specifically within such categories as dredging, harbor

improvements, dams, roadways, and housing, * * *.

This is a reasonable interpretation of the statute, since the phrase "including but not limited to" which introduces the second clause of the definition should be construed as enlarging the category set out in the first clause, as the term "including" in such a statutory definition is usually held to be a word of enlargement rather than a word of limitation. *American Surety Co.* v. *Marotta,* 287 U. S. 513; *United States* v. *National City Bank of New York,* 21 F. Supp. 791, 795 (S. D. N. Y.); *Koenig* v. *Johnson,* 71 Cal. App. 2d 739, 746–747, 163 P. 2d 746, 750; *Red Hook Cold Storage Co.* v. *Department of Labor,* 295 N. Y. 1, 7–8, 64 N. E. 2d 265, 267. Decedent's employment was on a project in connection with the war effort, and so within this interpretation. The intention of Congress was clearly to provide the broadest possible coverage to civilians employed outside the United States by government contractors. See Appendix, *infra,* pp. 19–23. The doctrine of *ejusdem generis,* invoked by petitioners (Pet. 16), does not warrant a construction of the Act which would limit it in a manner not intended by Congress. *Texas* v. *United States,* 292 U. S. 522, 534; *United States* v. *Gilliland,* 312 U. S. 86, 93. Moreover, the distinction made by petitioners (Pet. 16–17) between "work" and "services" is not applicable here, since the Act refers to "any employee engaged in any em-

ployment"—a phrase sufficiently broad to include both "work" and "services." We submit, therefore, that if the decedent's employment was not at an air base "acquired" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, then it was under a contract for the purpose of engaging in "public work" within the meaning of Section 1 (a) (4) and Section 1 (b) of that Act. Since the decision below is sustainable on the latter theory, the fact that the court below relied upon the former theory is no ground for reversal. *Helvering* v. *Gowran,* 302 U. S. 238, 245.

CONCLUSION

The decision of the court below is correct on the theory adopted by that court, or, in any event, is sustainable on the ground relied upon by the district court, which was not considered by the court below. There is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1948.

APPENDIX

Excerpts From the Legislative History of the Act of December 2, 1942, c. 668, 56 Stat. 1028

The following excerpts from the legislative history of the Act of December 2, 1942, c. 668, 56 Stat. 1028, indicate the intended scope of the Act, and particularly the intended scope of Title III thereof, which amended the Defense Base Act of August 16, 1941, c. 357, 55 Stat. 622 (42 U. S. C., Supp. V, 1651–1654):

1. This Act originated in the Senate of the 77th Congress as S. 2412, Title V of the original bill substantially embodying the provisions of the present Title III. At the Hearings before a Subcommittee of the Senate Committee on Education and Labor on S. 2412, 77th Cong., 2d sess., Major Burton, referring specifically to the original Title III and by implication to the original Title V (the present Title III), said (p. 55):

> Major Burton. I wanted to make the further observation, so there would be no question about it, the third title was drafted primarily to meet already existing needs of the War and Navy Departments in connection with the operations outside of the continental United States, and we have tried to incorporate in that bill legislation to cover those matters which we are now having to cover by contract.
>
> Senator Pepper. Take a workman, it covers defense projects but not factories, building bases and construction work of one sort or another?

Major BURTON. Well, as amended, it will cover every activity outside of the continental United States in connection with the war effort.

Senator PEPPER. It would include a factory that the Government established out there, but not a factory that local people built out there?

Major BURTON. Not unless they were doing it under a contract with the Government.

Now we have a few powder plants being built in this country by contractors, and they will be operated by the Government in this country. Now if such a situation should exist with reference to a factory outside of the United States, it would be covered here. That is, we have a contract with the Government to do that thing, and we carry employees outside of the United States to operate that plant who are going to work for a contractor who has a contract with the United States Government. Then this bill does cover them.

Senator PEPPER. Do you distinguish between a construction contract with the Government and an operation contract with the Government?

Major BURTON. Not so far as this bill is concerned, if it is outside of the United States.

2. Senator Pepper, sponsor of S. 2412, made the following statement during the debate on the bill, after it had been reported out by the Senate Committee on Education and Labor (88 Cong. Rec. 5339):

Mr. PEPPER. Let me add a further observation, then I will yield to the Senator. Heretofore the benefits of the Longshore-

men's Act have been available only to those who were working upon military or naval bases, and not on some other public work, which was provided or was in the course of construction at the instance of the United States Government. Under this bill any kind of a public work is included. So that, if a citizen of the United States or a person owing allegiance to the United States or a resident of the United States abroad should sustain injury in any one of these types or degrees, then the benefits of this proposed law would be available to such persons.

* * * * *

3. Before being passed by the Senate, S. 2412 was amended by the deletion of Titles I and II, so that the original Title V became the present Title III. See 88 Cong. Rec. 5413, 5426. During the Hearings before Sub-committee No. 1 of the House Committee of the Judiciary on S. 2412, 77th Cong., 2d sess., Lt. Col. Reese F. Hill, Chief of the Insurance Branch of the Fiscal Division, Headquarters, Services of Supply, War Department, testified as follows (p. 9):

* * * The problem involves not only cost-plus-fixed-fee contractors, but fixed-price contractors as well. We have contractors all over the world engaged in practically every zone of activity, and the War Department and the other Government departments concerned were beginning to absorb an administrative burden which, had we run into any considerable difficulty, would have been enormous. * * *

(p. 13):

Mr. KEFAUVER. Colonel Hill, you have stated clearly for the record as a fact, without divulging where, that the United States

is at this time, as we all know, building numerous bases throughout the world and you are having some difficulty in getting civilian workers to accept employment at those places?

Colonel HILL. Well, that is a major problem which is confronting the War Department today. We are engaged in activities which require employees of contractors not necessarily to be based in the enemy area, but perhaps, constantly to fly over occupied territory, or to fly routes which have never been flown before by that personnel, where there is no question but what they are in a war zone. * * *

(p. 21):

Colonel HILL. * * *

Title III amends the Longshoremen's and Harbor Workers' Compensation Act as extended by Public, No. 208, and the primary purpose of the amendment was to rephrase the language in order to make it absolutely clear as to the intent of it. It also was extended to apply to public works rather than to military and naval bases and was extended to the Canal Zone. This act was primarily conceived for the purpose of applying to military and naval bases.

Mr. KEFAUVER. You mean 208.

Colonel HILL. Public, No. 208 was primarily conceived for the purpose of applying to military bases. But now we have many agencies of the Government engaged in work in these out-lying areas and there was some question as to what would be a military base and what might not be a military base, depending upon, to some extent, the agency under which the work was being done.

In order to avoid that, and in order to provide an equal basis for employees in the same area subject to the same hazards, it was felt that it would be desirable to extend the application of 208 to public works rather than to limit the application of it to military and naval bases as originally enacted.

4. The report of the House Commitee on the Judiciary, H. Rept. 2581, 77th Cong., 2d sess., contained the following statement concerning Title III of the bill (pp. 18–19):

> * * * The purpose in including employees of Government contractors engaging in public work outside of the United States is to afford a uniform coverage for all employees of such contractors; that is, not only for those employees employed on military, air, and naval bases heretofore covered by the Defense Base Act, but for employees of such contractors who are engaged in construction and similar work at places not specifically within the confines of military and naval bases, which at some places may be contiguous thereto. This will eliminate the discrimination and inconsistency in affording protection to contractors' employees on military and naval bases and not affording similar protection to other Government contractors' employees, performing work for the United States often in the same general areas.

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